

U.S. Department of Labor

Office of Administrative Law Judges
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Date: February 28, 2001

Case No.: **1997-LHC-0515**

OWCP No.: **5-98527**

BRB No.: **99-0978**

In the Matter of:

DENNIS M. EMERSON,

Claimant,

v.

**NEWPORT NEWS SHIPBUILDING AND
DRY DOCK COMPANY,**

Self-Insured/Employer,

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**

Party-In-Interest.

DECISION AND ORDER ON REMAND DENYING BENEFITS¹

In a decision and order issued on March 5, 1999, the undersigned administrative law judge invoked the Section 20(a) presumption, found that there had not been rebuttal, and granted benefits to the claimant. In addition, Section 8(f) relief was granted to the employer, and a Section 14(e) penalty was assessed on the employer.

The employer appealed and, in a decision issued on June 16, 2000, the Benefits Review Board remanded the case for further

¹ The following abbreviations will be used as citations to the record:

ALJX	-	Administrative Law Judge's Exhibits;
EX	-	Employer's Exhibits;
DX	-	Director's Exhibits;
CX	-	Claimant's Exhibits; and,
TR	-	Transcript of the hearing.

consideration of rebuttal of the Section 20(a) presumption and as to the assessment of a penalty.

An order allowing submission of briefs was issued, briefs were submitted, and the record is considered to be closed.

The Board held that the opinion of Dr. Israel was sufficient to rebut the Section 20(a) presumption. The undersigned was directed to weigh the relevant evidence to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

Claimant's counsel argues that

In this case, there is no question that the exertions of working as a fireman for the shipyard have aggravated Emerson's condition, and that he is incapable of performing his job with the shipyard because the physical activity required aggravates his angina and underlying heart condition. Both of Emerson's treating physicians have opined that his heart condition was caused, at least in part, by his employment as a firefighter with the shipyard, due to the stress associated with the job, and due to the inhalation of smoke and fumes during his firefighting activities. In other words, Emerson's underlying heart condition was, in part, the result of his work at the shipyard and the angina attack was also the result of the physical exertion at work.

Emerson testified that he was working on his job as a firefighter when he experienced pain so serious he could not continue. Emerson testified credibly that on the day of the angina attack, he was called to a fire at a transformer on top of a ship shed. (Tr. 35). He was dressed in "full firefighting gear...that weighs 30-some pounds." (Tr. 36). After arriving at the fire, he took "a line of inch-and-a-half hose" and climbed "straight up" a "40 to 50 feet" ladder to reach the transformer. Id. Emerson estimated that he carried seventy pounds of equipment up the ladder. When he arrived at the top of the building, he "was so out of breath and [his]

chest hurt so bad, [he] couldn't get the fire out." Id.

The employer states that

What the Claimant does allege is that his attack of angina on February 7, 1996, somehow aggravated his underlying coronary artery disease. The evidence should be clear, by now, that this is not the case. No physician of record disputes that angina is a symptom of coronary artery disease that is transient in nature, and it does not in and of itself cause any impairment of the underlying disease process.

In weighing the evidence, the Employer respectfully submits that the Court must keep the distinction in mind between the cause and effect of Claimant's angina attack, and the cause of Claimant's underlying heart disease, which was manifest, diagnosed, and caused disability as early as 1991.

The episode of angina on February 7, 1996, did not and could not cause or materially worsen the Respondent's underlying heart disease [EX-6:4-5, 9, 53A]. Therefore, the Respondent's symptoms of angina experienced on February 7, 1996 do not constitute an injury or occupational disease. Furthermore, these symptoms neither caused nor "aggravated" (as that term is defined in the case law to be a "material worsening"), the Respondent's underlying heart disease. The only event that occurred at work on February 7, 1996 was an episode of exertional angina, which even the Petitioner's Clinic staff physician was able to ascertain to be "completely typical of his usual anginal pattern." [EX-4:7].

In a response brief, claimant's counsel stated that

Dr. Israel describes the claimant's angina attack as a transient symptom of heart disease. Still, Dr. Micale opined that further

firefighting activities would be hazardous to his health. And, the employer forced the claimant to retire two weeks after this "transient" symptom of his heart condition. Obviously, the claimant's angina attack was serious enough to warrant the employer forcing him to retire belying their argument such a condition was merely "transient".

In this case, Drs. Micale and Zullo have been treating the claimant for his heart condition extensively since 1991. Dr. Micale has performed several heart operations on the claimant. Drs. Micale and Zullo know the claimant's medical condition intimately and are not forced to rely solely on medical treatises for their opinions because they can rely on their own personal observations and treatment of the claimant's condition over time.

Thereafter, the employer stated that

The Claimant does not appear to deny that the Claimant's angina attack of February 7, 1996 constituted merely the transient symptoms of his underlying heart disease that resolved within a short period of time. The Claimant contends instead, offending simple principles of logic, that his angina attack, because it was followed by the Claimant's retirement two weeks later, caused the Claimant's future disability. Obviously, the Claimant retired two weeks later due to his underlying heart disease, which was the sole source of his continuing impairment.

It is argued that

neither Dr. Micale nor Dr. Zullo speaks to the issue of Claimant's angina attack, which is the basis for the subject claim. Secondly, neither explains why they consider work stress or smoke inhalation to be causative factors, but simply state presumptively that they are.

Evaluation of the Evidence

The decision in March 1999 is incorporated herein by reference. That decision stated in part:

Emerson, who suffers from high cholesterol, was diagnosed with coronary artery disease in 1991. (CX. 4B; TR. at 23.). In February 1991, he underwent an angioplasty procedure. (EX. 2; CX. 4C.). In May 1991, he underwent quadruple bypass surgery. (TR. at 23; CX. 3.). After this surgery, Emerson returned to NNS, where he was employed until February 22, 1996. (TR. at 23.)

On February 7, 1996, after climbing a fifty-foot ladder in order to fight a fire, Emerson "became extremely short of breath with [a] burning in his chest." (CX. 4S.). On February 13, 1996, Emerson complained to his family physician, Dr. Peter J. Zullo, that for the past six months, he had experienced burning in his chest when he engaged in strenuous physical activity. (CX. 4S.). In April 1996, Emerson received a repeat catheterization "with a subsequent angioplasty to a bypass vein graft." (CX. 4X.).

In April 1996, Dr. Zullo, who is board certified in internal medicine, stated that

Mr. Dennis Emerson has been a patient in my practice since January of 1991. During that time period, he was diagnosed as having coronary artery disease and underwent a bypass graft procedure in April of 1991. Up until recently Mr. Emerson had been doing well but he has subsequently developed angina pectoris and further problems with blockage of his coronary arteries. Due to the nature of Mr. Emerson's occupation as a firefighter, it is felt that he should be disabled due to his underlying heart problems. He has subsequently forwarded to me a copy of the Heart, Lung and Hypertension Act. In reading Paragraph B under 65.2/402, Mr.

Emerson's disability would be covered by this particular Virginia Workmens Compensation Act. This can be considered an occupational disease.

In July 1996, the physician stated that

Emerson continues to be somewhat limited in terms of activity in that if he exercises or lifts any significant amount of weight, he develops recurrent chest pain and shortness of breath. Mr. Emerson's clinical condition was aggravated by his employment as a fireman due to the rigorous physical activity and occupational exposure to smoke which the patient was sometimes exposed to. It was suggested to him that any further such activities would be-detrimental, to his health.

Dr. Zullo reported in October 1996 that

Unfortunately, due to the persistence of significant heart disease, it is my feeling that Mr. Emerson should no longer work due to the risk of cardiac problems.

Dr. Micale, who is board certified in internal medicine and in cardiovascular diseases, reported in February 1997 that Emerson was

asymptomatic but he is living a sedentary-lifestyle. He was exposed during his previous job to approximately one fire a day lasting for 30 minutes. These fires would be either oil fires or sulfur fires or just traditional fires. Additionally he was exposed to relatively high levels of carbon monoxide in the so-called apparatus room. This room apparently does not have any ventilation. Finally, emotional stress plays a big role.

In June 1997, Dr. Micale stated that

As you can see from my office note on February 25, 1997, I do feel, to a reasonable degree of medical probability, that Mr. Emerson's current heart condition is, at least

in part, associated with his smoke exposure at the Newport News Shipyard during the years of his employment as a firefighter and, perhaps, additionally, with the stress associated with his position at the Shipyard.

Dr. Israel, who is board certified in internal medicine and in cardiovascular diseases, reviewed records in late 1996. Dr. Israel stated that

Work-related stress is not a major risk factor for the development of atherosclerotic coronary artery disease or its sequelae. Work-related stress is not an agreed upon minor risk factor (and also in my opinion not even a minor risk factor) for atherosclerotic coronary disease or its sequelae. It is therefore my opinion, based upon reasonable medical certainty, that Mr. Emerson's atherosclerotic heart disease, his need for percutaneous transluminal coronary angioplasty in February 1991, his multiple coronary bypass surgery in April 1991, his chronic angina pectoris, and his need for percutaneous transluminal angioplasty of a saphenous vein graft in April 1996 are due to his multiple major "risk factors" as noted above, and not causally related to his work activities as a fire fighter.

...It is therefore my opinion, based upon reasonable medical certainty, that any evaluation and therapy after February 7, 1996 was caused by Mr. Emerson's underlying atherosclerotic coronary artery disease, and not causally related to the episode of angina pectoris on February 7, 1996.

In May 1997, Dr. Israel reported that

An additional fact has been added by Dr. Micale's note of February 25, 1997: that Mr. Emerson was exposed to daily fires lasting for thirty minutes including exposure to burning oil, sulfa and carbon monoxide. These facts do not alter my opinion as to the lack of causality between his work activities and his

atherosclerotic coronary artery disease and its sequelae.

...It therefore remains my opinion, based upon reasonable medical certainty, that Mr. Emerson's exposure to fires working as a fire fighter was not causally related to his atherosclerotic coronary artery disease and its sequelae.

Regarding the possibility of job-related emotional stress "causing" his atherosclerotic coronary artery disease or its sequelae, I do not feel that I need to add to my previous discussion that, in my opinion, is "proof" that it does not.

Finally, I would agree that Dr. Micale's "bald assertion" (that Mr. Emerson's heart condition is in part associated with his smoke exposure and emotional stress) is highly speculative from a medical standpoint, not consistent with the current state of medical science. Recognize, however, that Dr. Micale states that this is his feeling. He does not (and cannot, in my opinion) state this with reasonable medical certainty.

Discussion

It is clear that Emerson had severe coronary disease prior to 1996 as indicated by the previous bypass surgery. The employer acknowledges that the claimant suffered exertional angina on February 7, 1996. However, the employer argues that the symptoms on that date were transient and did not produce additional impairment.

Drs. Micale and Zullo imply that rigorous work activities and exposure to smoke have, in part, caused the heart disorder or aggravated the impairment. They note that Emerson underwent another bypass operation in April 1996 and that they recommended that that he cease working as a firefighter.

Although Dr. Israel is not a treating physician the undersigned finds his reports to be the most credible as these are detailed and persuasive. Dr. Israel states that the attack in February was acute and did not result in increased disability. Therefore, aggravation is not shown in this case. The preexisting disease may make it imprudent for Emerson to continue working in the same capacity.

Order

1. The claim for compensation and medical benefits based on cardiovascular disease is **DENIED**.
2. An application for Section 8(f) relief is premature as permanent benefits have not been granted.
3. The employer shall receive credit for all compensation that has been paid.
4. The employer is not liable for a penalty under Section 14(e) of the Act as benefits have not been granted.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia